STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND THE WORKERS' COMPENSATION APPELLATE COMMISSION

MARY BAILEY,

Plaintiff-Appellee,

vs

OAKWOOD HOSPITAL AND MEDICAL CENTER,

Defendant-Appellant,

and

SECOND INJURY FUND/VOCATIONALLY HANDICAPPED PROVISIONS,

Defendant-Appellee,

and

DIRECTOR OF THE BUREAU OF WORKERS' AND UNEMPLOYMENT COMPENSATION,

Intervenor-Appellee.

_____/

Supreme Court: 125110

Court of Appeals: 243132

Lower Court: WCAC Docket No: 010076

BRIEF ON APPEAL -- PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED

ITEM: PAGE:

Cases

Statutes

Other Authorities

STATEMENT OF BASIS OF JURISDICTION

Plaintiff does not dispute defendant's statement of the basis for this Court's jurisdiction over this matter, but would further note that jurisdiction is conferred by MCR 7.301(2).

STATEMENT OF QUESTION PRESENTED

IS THE FAILURE OF AN EMPLOYER TO GIVE TIMELY NOTICE TO THE SECOND INJURY FUND OF THE CLAIM OF AN EMPLOYEE CERTIFIED AS VOCATIONALLY HANDICAPPED IRRELEVANT TO THAT EMPLOYEE'S RIGHT TO BENEFITS FOR A WORK-RELATED DISABILITY?

Plaintiff-Appellee answers "YES."
The WCAC answered "NO."
The Court of Appeals answered "YES."

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(Parenthetical numbers followed by "a" shall refer to pages of Appellant's Appendix on Appeal.)

The proceedings described below were initiated upon the filing by plaintiff Mary Bailey of an application for mediation or hearing during May, 1998, alleging bilateral carpal tunnel syndrome, chronic pain and depression arising out of and in the course of her employment with defendant Oakwood Hospital and Medical Center ["Oakwood"] (14a).

Oakwood subsequently filed its own application on May 29, 1998, alleging that plaintiff had failed to cooperate with vocational rehabilitation and was avoiding work. Oakwood sought the termination of her benefits accordingly (14a).

In addition, Oakwood filed another application on January 14, 1999, adding the Second Injury Fund ["the Fund"] as a party defendant. Oakwood sought reimbursement from the Fund pursuant to the vocationally handicapped provisions of the Worker's Disability Compensation Act ["WDCA"] (14a), which shall be briefly explained below.

Pursuant to MCL 418.911, an unemployed person may seek certification as vocationally handicapped. This classification applies to a person who "has a medically certifiable impairment of the back or heart, or who is subject to epilepsy, or who has diabetes, and whose impairment is a substantial obstacle to employment, considering such factors as the person's age, education, training, experience, and employment rejection." MCL 418.901(a).

When an individual is so certified, MCL 418.921 limits the liability of subsequent employers for weekly benefits to a period of 52 weeks, and imposes further responsibility for benefits upon the Fund:

> "A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act, or in case of his death resulting from such injury, the compensation shall be paid to his dependents. The liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund. The fund shall be liable, from date of injury, for those vocational rehabilitation benefits provided in section 319."

In that regard, the statute further obliges the carrier[1] to notify the Fund of the likelihood that it will be called upon to assume liability for benefits:

> "When a vocationally disabled person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury. The fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability." MCL 418.925(1).

After receiving such notice, the Fund is required to notify the carrier if it chooses to dispute the claim:

> "If the fund does not notify the carrier of its intent to dispute the payment of compensation, the carrier shall continue to make payments on behalf of the fund, and shall be reimbursed by the fund for all compensation paid and pertaining to the period beyond 52 weeks after the date of injury. However at any time subsequent to 52 weeks after the date of injury, the fund may notify the carrier of a dispute as to the payment of compensation. The liability of the fund to reimburse the carrier shall be suspended 30 days thereafter until such controversy is determined." MCL 418.925(2).

The vocationally handicapped provisions also include a provision permitting the Fund to object to its joinder as a party defendant in a contested case:

> "(1) If an employee was employed under the provisions of this chapter and a dispute or controversy arises as to payment of compensation or the liability therefor, the employee shall give notice to, and make claim upon, the employer as provided in chapters 3 and 4 and apply for a hearing. On motion made in writing by the employer, the director, or the worker's compensation magistrate to whom the case is assigned, shall join the fund as a party defendant.

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[1]While this and other statutes involved in this matter use the word "carrier," the WDCA expressly defines that word to include self-insurers like Oakwood. MCL 418.601(c).

> "(2) The bureau within 5 days of the entry of an order joining the fund as a party defendant shall give the fund written notice thereof by first-class mail which notice shall be mailed not less than 30 days before the date of hearing and shall include the name of the employee and employer and the date of the alleged personal injury or disability.
>
> "(3) The fund, named as a defendant pursuant to motion, shall have 10 days after the date of mailing of notice of joinder to file objection to being named a party defendant. On the date of the hearing at which the liability of the parties is determined, the worker's compensation magistrate first shall hear arguments and take evidence concerning the joinder as party defendant. If the fund has filed a timely objection, and if the argument and evidence warrant, the worker's compensation magistrate shall grant a motion to dismiss." MCL 418.931.

The impact of these provisions is the sole question to be resolved in this case. Oakwood has stipulated both that plaintiff sustained an injury arising out of and in the course of her employment, and that she remained disabled as a result (15a). It has filed no appeal with this Court as to any other issue, nor has the Fund. Nor, at this point, is there any remaining dispute that plaintiff was certified as vocationally handicapped.

The genesis of the dispute was accurately described by the Court of Appeals as follows:

> "At some point during the proceedings defendant discovered plaintiff's vocationally handicapped worker's certificate. In November 1998 defendant filed a claim against the Second Injury fund (the Fund) seeking reimbursement for benefits it paid plaintiff past the one-year period set by MCL 418.921. The Second Injury fund moved to dismiss defendant's petition for failure to comply with the notice provisions set by MCL 418.925." (35a)

Magistrate G. Jay Quist granted the Fund's motion to dismiss in an opinion mailed on October 4, 1999 (1a). The magistrate held that dismissal was required, given Oakwood's failure to timely notify the Fund of plaintiff's claim (4a-5a).

Oakwood filed an interlocutory appeal from this determination. In an opinion and order dated May 26, 2000, the Workers' Compensation Appellate Commission ["WCAC"] held that, when a case is contested, MCL 418.931(1) provides for mandatory joinder of the Fund upon a motion from the employer (11a). As a result, the WCAC found that the magistrate improperly dismissed the Fund, and remanded the case with the instruction that the Fund be joined as a party (11a).

Before the magistrate could render an opinion on remand, the Court of Appeals issued its opinion in *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000). That case held that, where timely notice was not given pursuant to MCL 418.925(1), the Fund could not be joined as a party.[2] As a result, in a decision mailed on January 29, 2001, the magistrate again dismissed the Fund as a party, but still imposed an award against Oakwood (13a,22a-24a).

Oakwood filed a timely appeal from this determination with the WCAC. In an opinion dated July 18, 2002, the WCAC affirmed the dismissal of the Fund, although it disagreed with the reasoning of the *Robinson* Court (32a). However, the WCAC went one step further, holding that the statute provided no basis for the imposition of an award against Oakwood beyond one year from the date of injury (32a). As a result, although plaintiff was found to have sustained a work-related disability, ongoing benefits were denied based upon a finding that there was no one legally responsible for compensating her (25a,32a).

Plaintiff sought leave to appeal to the Court of Appeals, contending that the Legislature obviously did not intend to punish her for Oakwood's failure to timely give notice to the Fund. Leave was granted on November 14, 2002 (33a).

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[2]This Court subsequently denied leave to appeal in that matter. *Robinson v General Motors Corp*, 463 Mich 675; 623 NW2d 602 (2001).

In a published opinion dated November 6, 2003[3], the Court of Appeals reversed the WCAC's order terminating plaintiff's benefits, reasoning:

> "It is undisputed that defendant did not notify the Fund within the time required by §925. Because defendant failed to timely notify the Second Injury Fund as required by §925(1), it cannot pass its liability for plaintiff's continued benefits on to the Fund's [sic] under §921. Nor should defendant be given the benefit of the fifty-two week limitation set forth in §921 where it has not effectively brought the Fund into the action. Section 921 expressly provides that a vocationally disabled person who is injured on the job 'shall be paid compensation in the manner and to the extent provided in this act.' Other parts of the act require that employees disabled by a work-related injury receive benefits 'for the duration of the disability.' MCL 418.351(1) and 418.361(1). While §921 provides that after 52 weeks of disability, the Second Injury Fund will pay benefits for previously vocationally-disabled persons, that section only applies if the Fund has been properly notified of the claim and made a party to any action for benefits. Invoking the payment schedule set by § 921 when the Fund was never properly brought into the case is illogical, inconsistent with the language and purpose of the act, and unjustly punishes plaintiff for defendant's lack of diligence."

The Court remanded the case to the WCAC, "to address defendant's challenge to the magistrate's finding that it had not shown that plaintiff was avoiding work" (38a). [The WCAC had deemed this issue moot, given its finding that no further benefits were payable (32a).]

Oakwood sought leave to appeal to this Court. In an order dated July 8, 2004, the Court granted leave, further writing:

> "On order of the Court, the motion for leave to file brief amicus curiae is considered, and it is GRANTED. The application for leave to appeal the November 6, 2003 judgment of the Court of Appeals is considered, and it is GRANTED. The parties are directed to include among the issues to be briefed whether the Court of Appeals properly interpreted MCL 418.921 and MCL 418.925 in *Robinson v General Motors Corp.*, 242 Mich App 331; 619 NW2d 411 (2000), *Valencic v TPM, Inc*, 248 Mich App 601, 639

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[3]*Bailey v Oakwood Hospital and Medical Center*, 259 Mich App 298; 674 NW2d 160 (2003).

NW2d 846 (2001), and this case. In discussing this issue, the parties should consider the following: (1) whether the imposition of liability on the employer for paying benefits after 52 weeks of disability, in those situations where the Second Injury Fund does not receive statutory notice, is consistent with MCL 418.921's statement that the employer's liability 'shall be limited' to a 52-week period and that responsibility for all later benefits 'shall be the liability of the fund'; (2) whether MCL 418.925's placement of responsibility for providing notice to the Second Injury Fund on the carrier, not the employer, affects the analysis of this issue; and (3) whether the lack of a statutory remedy for a carrier's failure to provide timely notice to the Second Injury Fund affects the analysis of this issue." (44a)

ARGUMENT

THE FAILURE OF AN EMPLOYER TO GIVE TIMELY NOTICE TO THE SECOND INJURY FUND OF THE CLAIM OF AN EMPLOYEE CERTIFIED AS VOCATIONALLY HANDICAPPED MAY NOT DEPRIVE THAT EMPLOYEE OF THE RIGHT TO BENEFITS FOR A WORK-RELATED DISABILITY.

Standard of Review. This Court reviews findings of fact rendered by the WCAC to determine whether they are supported by any evidence in the record, but may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. Const 1963, Art VI, §28; MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000); *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999). Issues of statutory construction are reviewed by this Court de novo. *DiBenedetto, supra*.

This case involves an individual found, and in fact *stipulated*, to have sustained a work-related disability. The underlying purpose of the WDCA is to compensate those who suffer disabling work injuries: "The objective of the social legislation is to provide the disabled worker with benefits during the period of his disability so that the worker and his dependents may survive (literally) the catastrophe which the temporary

cessation of necessary income occasions." *McAvoy v HB Sherman Co*, 401 Mich 419, 437; 258 NW2d 414 (1977). This objective is embodied in MCL 418.301(1), the controlling and overriding provision of the entire WDCA. It reads, in pertinent part, as follows:

> "An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to the act at the time of the injury, shall be paid compensation as provided in this act."

The Legislature's use of the word "shall" denotes the mandatory nature of its directive. *Id*, at 446-447. Consequently, it is clear from this language that someone who has sustained a work-related injury is to be paid compensation.

This directive is carried forward into the total disability provision of the Act, MCL 418.351(1), which requires the payment of compensation "for the duration of the disability":

> "While the incapacity for work resulting from a personal injury is total, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability."

Similarly, the partial disability statute, MCL 418.361(1), requires the payment of compensation while the incapacity for work continues:

> "While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the injury, but not more than the maximum weekly rate of compensation, as determined under section 355."

As a result, the Act's controlling provisions are clear: an employee disabled by a work-related injury is entitled to workers' compensation benefits for the duration of his or her incapacity.

This concept is not supplanted by Chapter 9, the Vocationally Handicapped chapter of the WDCA. Indeed, consistent language appears in the first sentence of MCL 418.921:

> "A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act, or in case of his death resulting from such injury, the compensation shall be paid to his dependents."

Again, this language makes it clear that those disabled as the result of a work-related injury are to be compensated. It further indicates that the fact that an individual has been certified as vocationally handicapped does not enlarge or contract the right to benefits, which are to be paid "in the manner and to the extent" provided in the WDCA in general. In other words, vocationally handicapped individuals have the same entitlement that anyone else has under the WDCA. Their certification should not change that fact, nor is there any provision in the WDCA requiring or providing for any such change.

The vocational certification provisions therefore proceed from the same starting point as any other provisions of the WDCA -- the need to compensate disabled employees. They simply institute a means by which the liability for that compensation may be shifted. More specifically, the remainder of MCL 418.921 relieves an employer of liability under expressly delineated circumstances, while simultaneously shifting that liability to another party, the Fund:

> "The liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all com-

> pensation and cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund. The fund shall be liable, from date of injury, for those vocational rehabilitation benefits provided in section 319."

This language should not be read in isolation. Instead, it should be read in combination with the first sentence of §921 and its overriding expression of legislative intent. See *Rowell v Security Steel Processing Co*, 445 Mich 347, 356-357; 518 NW2d 409 (1994). That intent is clear -- the payment of benefits to employees disabled by work-related injuries or illnesses. This, then, is the overriding objective of both the Act *and* Chapter 9.

Consequently, a finding that a claimant who is disabled as the result of a work-related injury is to receive no workers' compensation benefits after a year, even if disability continues, does not comport with the language of the WDCA or the intent of the Legislature. This is undoubtedly the reason that neither defense *amicus* party has suggested that plaintiff may be left without benefits, while Oakwood has not directly so stated.

Plaintiff takes no position as to the effect of Oakwood's failure to notify the Fund in a timely fashion. However, should this Court find that Oakwood's untimely notice precludes the shift of liability to the Fund, then liability should stay with Oakwood. If an employer fails to follow the necessary procedures to shift liability, it should not receive the same benefit as those who properly comply with those procedures.

Oakwood notes that MCL 418.921 indicates that it "shall" be liable for no more than 52 weeks of benefits, and this is so. However, this statute also states that the Fund "shall" be liable thereafter:

> "A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided

> in this act, or in case of his death resulting from such injury, the compensation shall be paid to his dependents. The liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act **shall** be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and expenses of the employee's last sickness and burial **shall** be the liability of the fund. The fund shall be liable, from the date of injury, for those vocational rehabilitation benefits provided in section 319." *Id* (emphasis supplied).

Clearly, either both of these "shalls" are mandatory, or neither is. Consecutive sentences of the statute must be construed together to produce a consistent whole. *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994). If the shift of liability to the Fund is conditioned on timely notice, so should be the 52-week limit on the employer's liability. If the 52-week limit is mandatory, so should be the liability shift. These are the only consistent ways to read the statute.

Furthermore, if anyone is to be penalized by Oakwood's failures, it should be Oakwood itself. The Legislature obviously did not intend to reward a party for failing to carry out its statutory duty, while punishing an innocent party in the process. If anyone is to suffer as the result of Oakwood's failures, it should be Oakwood, not plaintiff.

Plaintiff should be found entitled to ongoing benefits, whether paid by Oakwood or the Fund. She is entitled to benefits "in the manner and to the extent provided in this act," MCL 418.921, and nothing in the WDCA suggests that an individual certified as vocationally handicapped should receive any greater *or less* benefits than someone not so certified.

Consequently, at least insofar as it provides that plaintiff is to receive continuing benefits, the Court of Appeals' opinion should be affirmed.

RELIEF

WHEREFORE Plaintiff-Appellee MARY BAILEY respectfully requests that this Honorable Supreme Court deny defendants' application for leave to appeal, and further grant her any other relief to which she may be entitled.

Respectfully submitted,

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Dated: November 4, 2004